IX. ARGUMENT

A. FERC's decision to accept, as just and reasonable, the Contested Settlement without sufficient record evidence to support the Transition Payments, is arbitrary, capricious and inconsistent with the public interest.

FERC's conclusions that: (1) the Transition Payments "result in just and reasonable rates for existing generators;" (2) the Transition Payments "fall within the reasonable range of capacity prices;" and (3) that "contesting parties are in no worse position under the Contested Settlement than they would have been through continued litigation"[89] do not constitute reasoned decision making and are not supported by substantial evidence.[90] Specifically, as discussed below, the record does not contain evidence of the costs of existing generators and, therefore, there was no reasonable basis for FERC to conclude that a multi-billion dollar rate increase constitutes "reasonable compensation" for them. Similarly, there was no basis for determining "a reasonable range of capacity prices" for existing generation. Finally, FERC unreasonably relied on the prices that were expected to be produced by mechanisms that it never scrutinized or adopted in determining that

---

[89] June 16 Order at P 89, R1129.

[90] *See, Laclede Gas Co. v. FERC*, 997 F.2d 936, 945 (D.C.Cir. 1993) ("*Laclede*").

the contesting parties are in no worse position under the Contested Settlement than they would have been through continued litigation.[91]

1. The record contains no cost support for FERC's conclusion that the Transition Payments result in just and reasonable compensation for existing generation or fall within the reasonable range of capacity prices.

a. There is no record evidence of costs of existing generators.

FERC justifies the Transition Payments as "just and reasonable rates for *existing* generators."[92] That the purpose of the Transition Payments is "short-term measure to ensure that *existing generating units* remain available"[93] is not in dispute. FERC, ISO-NE and Settling Parties agree that new capacity will not be purchased under the FCM until the 2010/2011 power year.[94] Further, the Transition Payments were not determined through a market mechanism, but rather were set at a fixed level, negotiated by the Settling Parties.[95]

---

[91] Petitioners make no separate argument related to the *ISO-NE* Orders, because the outcome of this appeal will necessarily affect the legality of the *ISO-NE* Orders.

[92] June 16 Order at P 89, R1129 (emphasis added).

[93] *Id.* at P 65, R1129 (emphasis added),

[94] *See id.* at P 30, R1129; Contested Settlement Explanatory Statement at 13, R1071.

[95] *See id.* at P 17, n.25, R1129.

Because FERC's justification for the Transition Payments is "reasonable compensation for existing generation," and is not focused on the development of new generation during the Transition Period, the level of Transition Payments must be supported by evidence of these generators' costs in order for FERC to have reasonably concluded that the rates are just and reasonable. However, the record contains no such cost information. In the absence of any cost information regarding existing generation, there was no reasonable basis upon which FERC could conclude that the Transition Payments result in "the costs of providing service to the utility's customers, plus a just and fair return on equity"[96] or that these are rates "not materially exceeding the range needed to assure availability of the needed generating capacity."[97]

This Court recently examined a similar situation. In *NSTAR*, FERC had approved, as just and reasonable, "mitigation agreements" between ISO-NE and various generators needed for reliability in specific areas.[98] These agreements negotiated under the former Market Rule 17 were the precursor to RMR agreements. Where FERC had failed to review any of the cost data underlying the

---

[96] *Pacific Gas and Elec. Co. v. FERC*, 306 F.3d 1112, 1120 (D.C. Cir. 2002) *citing Ala. Elec. Coop, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

[97] *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794, 803 (D.C. Cir. 2007).

[98] *See id.* at 802.

contracts *and did not even have before it for review the actual cost data*, this Court stated:

> The bare fact that the agreements set compensation at a percentage of fixed or variable costs does not support the conclusion that the rates contained in the agreements are just and reasonable when the Commission lacks data concerning the generators' costs.[99]

This Court also rejected FERC's argument that ISO-NE's scrutiny of the agreements satisfied FERC's statutory obligation to determine that the rates were just and reasonable, concluding that because there is no evidence that ISO-NE has an incentive to bargain for low prices, FERC could not substitute ISO-NE's scrutiny of the mitigation agreements for FERC's statutory obligation to independently review the underlying cost data to ensure that the agreements were reasonable.[100] Accordingly, this Court remanded the matter to FERC to analyze whether the rates adopted in the mitigation agreements were just and reasonable.[101]

Here, because FERC has approved, for the Transition Period, rates that are not even purportedly based on specific generator costs there is simply no basis to determine that these rates are just and reasonable cost-based compensation, nor are they market-based rates. Further, FERC has not even determined, for the

---

[99] *Id.* at 803.

[100] *Id.*

[101] *Id.* at 804.

Transition Period, which generators needed additional revenues and what level of revenues might be necessary to supplement energy-market revenues RMR contracts. FERC, in fact, refused to hold a hearing to determine what level of revenues was appropriate for the Transition Period, even though parties had asserted that "a hearing would reveal that the transition payments are not just and reasonable because they are far in excess of what is needed by generators to supplement revenues from energy and ancillary markets,"[102] and in spite of the testimony that the Transition Payments "will play little or no role in retaining existing Resources" because "many generators would remain on the system regardless of any transition payments."[103] The reason for this, explained Dr. Austin, was that with the current high level of gas and oil prices, and the role of these prices in setting energy prices, generators that use other fuels "are doing rather well."[104] Dr. Austin cited FPL Energy as an example, whose New England holdings include significant amounts of nuclear and hydro generation, and who had reported "a 70% increase in earning for 2005" and "significantly improved market

---

[102] MPUC Settlement Comments at 12, R1078. Petitioners do not claim that an evidentiary hearing is necessary if FERC were able to resolve disputed issues of fact on the basis of a paper hearing; however, some additional proceedings are critical to adduce evidence about the costs of existing generation in order to support FERC's conclusion that the Transition Payments are just and reasonable.

[103] Austin Affidavit at ¶ 12, R1078.

[104] *Id.*

conditions in the NEPOOL market."[105] Dr. Austin further stated that "a generator needed for reliability has the opportunity to seek an RMR contract."[106] Dr. Austin concluded that "[i]f t the transition payment were substantially reduced, we would presumably see more RMR contracts, lower overall costs, and an adequate number of units remaining on the system."[107]

Similarly, the Attorneys General and other parties representing load in Massachusetts and Connecticut argued that the Contested Settlement failed to deal with a principal concern that FERC hoped to address in requiring ISO-NE to file a market approach to replace RMR agreements, namely, that entities not be able to choose between the higher of market revenues or cost-of-service revenues."[108] Further, they asserted that the Transition Payment component of the Contested Settlement results in "guaranteed payments to generators without regard either to market conditions, reliability contributions or cost of service."[109]

FERC failed to address these arguments and failed to properly evaluate revenues that generators would receive from the energy and ancillary service

---

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] NSTAR *et al.* Settlement Comments at 20, R1080.

[109] *Id.* at 23, R1080.

markets, which evaluation is critical in determining how much additional compensation is needed for existing generators. MPUC had pointed out that the Transition Payments had no offset for revenues from the energy market, and IECG noted that ISO-NE had understated these revenues in using a Peak Energy Rent ("PER") adjustment in comparing the cost under a LICAP regime and under the Contested Settlement.[110]

FERC's failure to adduce evidence relating to the costs and revenues of existing generators stands in sharp contrast to its decision in a related contested settlement agreement involving an RMR agreement. In *Bridgeport Energy*,[111] FERC understood its "obligation to examine the facts in each instance against the standard of Section 205(a) of the FPA that all rates and charges demanded by any public utility for the sale of electric energy subject to the Commission's jurisdiction shall be just and reasonable."[112] There, FERC found that even though the Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel, as Settling Parties, had agreed that Bridgeport was entitled

---

[110] *See* MPUC Settlement Comments at 13-14, R1078; *see also* IECG Settlement Comments at 14, R1085 (criticizing that the absence of any offset from the Transition Period payments to recognize the rents received in the energy market and asserting that high energy rents have "substantially enriched base load non-gas fired units in New England.")

[111] 118 FERC ¶ 61,243.

[112] *Id.* at P 61.

to an RMR contract, FERC had an obligation to determine whether Bridgeport actually needed the contract. FERC found that:

> ...the Partial Settlement Agreement provides no factual basis for determining resolution of Bridgeport's threshold eligibility for the RMR Agreement. Absent an evidentiary hearing, we will not have an adequate record upon which to make a determination on this issue.[113]

In contrast, in the *Devon* Orders, FERC refused to make any independent judgment about whether the interim payments are "rates not materially exceeding the range needed to assure availability of the needed generating capacity."[114] Thus, FERC failed to meet its statutory obligation to determine that the Transition Period rates are just and reasonable.

FERC stresses that its decision does not make a just and reasonable determination on the merits of the Transition Payments as an individual component but rather "that the transition payments are a just and reasonable component of the overall package embodied in the Settlement Agreement . . ."[115] However, other than explaining that the Transition Payments serve as a "bridge" to the FCM which is a market mechanism, FERC never explains how the other features of the Contested Settlement make up for the lack of substantial evidence supporting the need for Transition Payments approved in the *Devon* Orders. Because FERC has

---

[113] *Id.*

[114] *NSTAR*, 481 F.3d at 803.

[115] June 16 Order at P 89, R1129.

failed to demonstrate the method by which it determined that the package made up for shortcomings in the Transition Period, there is no basis upon which it can be determined that the other components of the Contested Settlement support a determination that the entire package is just and reasonable.

b. FERC's reliance on the Cost of New Entry was unjust and unreasonable.

FERC's quandary of finding record support for the negotiated Transition Payments is not resolved by reference to the benchmark figure for the Cost of New Entry ("CONE") used in the market mechanism to go into effect in 2010 (or 2011 under Section 11.VIII.I. of the Contested Settlement). FERC states:

> ... the proposed transition payments are significantly less than the estimated cost of new entry of *a new peaker*, a type of plant whose capital costs are lower than most, if not all other plants. Thus the payments are likely to be significantly lower *than a cost-of-service payment for most, if not all, new generators.*[116]

As is clear from FERC's own explanation, the CONE represents the estimated cost of a *new* peaker, not an existing generator which may have very different and much lower capital costs. Further, the CONE is part of the FCM. Unlike a cost-based rate, the FCM uses a *market* mechanism to define the CONE through the auction process; the CONE is an integral part of the FCA. As FERC explained:

> In approving CONE, the Commission is not approving prices for generation capacity. Prices for capacity will be established via

[116] June 16 Order at P 101, R1129 (emphasis added).

> descending clock auctions, and thus will ultimately be established via competitive bidding. CONE represents the estimated cost of new entry ($7.50/kw-month) and serves as the basis for the beginning point for the first FCA. Settling Parties agreed on a beginning point for the first FCA: 2 times CONE.[117]

FERC's explanation makes clear that the CONE has nothing to do with the cost of *existing* capacity. Rather, the initial CONE simply provides a starting point for the auction in which new capacity sets the price.

In short, having found that the purpose of the payments is to compensate existing generation, FERC's reliance on the cost of "new" entry as a basis for approving the Contested Settlement was arbitrary and capricious, because the decision contains no nexus between the CONE and the costs of existing generation. Where there is no expectation of new capacity during the transition period, FERC acted arbitrarily in comparing a benchmark for the cost of a new entrant to the rates necessary to compensate existing generation during the period prior to the beginning of the market.

c. FERC's reliance on possible outcomes of proposed models it neither vetted nor found to be just and reasonable in determining that the Transition Payments fall within the reasonable range of capacity prices was arbitrary and capricious.

FERC's other basis for finding the Transition Payments just and reasonable, that the rates were lower than various possible outcomes under various demand

[117] Rehearing Order at P 111, R1149.

curves, none of which FERC ever vetted or found to be just and reasonable, fails the standard of "reasoned" decisionmaking.

In the June 16th Order, FERC found that:

> ...based on record evidence from the hearing, the [transition] payments fall with the reasonable range of capacity prices, and contesting parties are in no worse position under the Settlement Agreement than they would have been through continued litigation.[118]

This finding assumes that the rates that would flow from the demand curve approach are reasonable. However, the *Devon* Orders are devoid of any analysis of the proposals which purportedly establish the reasonable range. In fact, FERC made very clear that it "never ruled on the justness and reasonableness of that [ISO-NE proposed] demand curve or any of the other demand curves proposed in the hearing (although the Initial Decision did adopt ISO-NE's proposal)."[119] FERC further concluded that the parties opposing the Contested Settlement "would have been no worse off under the settlement than through continued litigation" because the Transition Payments result "in rates for capacity that are lower than the projected payments under ISO-NE's proposed demand curve (which we note was adopted in the Initial Decision) and that are comparable to the rates under

---

[118] June 16 Order at P 89, R1129.

[119] *Id.* at P 90, R1129.

alternative demand curves proposed at the hearing, bringing those rates within a range that we find is just and reasonable."[120]

Finding that the rates under the Contested Settlement are lower than those proposed by ISO-NE under a methodology approved by the Presiding Judge but not analyzed or adopted by FERC cannot be the basis of a well-reasoned decision that the rates are just and reasonable. If FERC sought to use ISO-NE's proposal as a benchmark for just and reasonable rates, FERC was required to, but did not, independently review whether ISO-NE's proposal was just and reasonable.[121] Where FERC never found any of the proposals before the ALJ to be just and reasonable, the prices that might flow from these proposals cannot supply a "reasonable range of capacity prices" against which to compare the Transition Payments.[122]

2. FERC's failure to respond meaningfully to Petitioners' and Intervenors' objections was arbitrary and capricious.

FERC failed to address Petitioners' and Intervenors' objections to the Transition Payments. As discussed above, Petitioners, as well as the Maine Industrial Consumers Group, raised legitimate objections to the level of the

---

[120] *Id.* at P 72, R1129 (citations omitted).

[121] *See NSTAR,* 481 F.3d at 803.

[122] For the same reason, FERC's decision is not helped by its use of the demand curve proposal made under protest by the Maine/Vermont parties at the hearing or by its choice of one of the middle-of-the-pack of the unevaluated proposals.

Transition Payments and the lack of substantial evidence to establish that the payments were just and reasonable compensation for existing generators. FERC ignored these objections, finding "while it may not consider the transition payments ideal as a single market design element, when considered as part of the larger Settlement Agreement (consistent with the second approach of *Trailblazer*), they serve as a reasonable transitory mechanism that enables the New England region to shift to the FCM."[123] FERC's use of the second prong of *Trailblazer* as a shield against having to address the objections of Petitioners was arbitrary and capricious.[124]

3. FERC acted arbitrarily and capriciously in ordering an overbroad remedy to the market problem it identified.

FERC's approval of the Contested Settlement was arbitrary and capricious because the Transition Payments are an overbroad remedy to the problem FERC identified. While FERC originally sought to implement a *market* structure to replace RMR contracts,[125] the Transition Payments: (1) are, by all accounts, *not*

---

[123] Rehearing Order at P 20, R1149 (discussing conclusions in the June 16 Order).

[124] *See PPL Wallingford Energy, LLC, et al. v. FERC*, 419 F.3d 1194, 1199-2000 (D.C. Cir. 2005) (FERC acted arbitrarily and capriciously when it failed to respond directly to gas-fired generator's point about the effect of the sharp increase in gas prices on its ability to compete with non-gas-fired units).

[125] April 25 Order at P 31, R40. FERC also was concerned that "some generators needed for reliability in load pockets -- i.e., in DCAs -- may be unable to recover

market-based, (2) do not replace RMR contracts, and (3) are not cost-based. Providing fixed payments to all suppliers, regardless of need, is an overbroad remedy, which is exacerbated by of FERC's failure to eliminate RMR agreements during the Transition Period. The Transition Payments do not target relief to reliability units in DCAs-- the problem that FERC identified--but instead provides payments to all generators regardless of need. Making multi-billion dollar Transition Payments to all New England generators, regardless of need, to solve, on an interim basis, a limited problem is arbitrary and capricious.[126]

B. FERC's rejection, as irrelevant, of evidence demonstrating that there should be locational pricing in the transition period was arbitrary and capricious.

FERC acted arbitrarily and capriciously in rejecting, as irrelevant, evidence that supported MPUC's claim that there should be price-differentiation in the Transition Payments between Maine and the rest of New England, as there is in the energy market. Further, because the Contested Settlement continues a structure that FERC already found to be unjust and unreasonable, FERC acted arbitrarily in finding the Contested Settlement to be just and reasonable. In failing to price-

---

their full fixed and variable costs and not be available for reliability." *Id.* at P 28, R40.

[126] *See Public Utilities Com'n of State of Cal. v. FERC*, 462 F.3d 1027, 1055 (9th Cir. 2006) ("*[P]roportionality* between the identified problem and the remedy is the key. . . . the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious.")

differentiate between load pockets and areas with sufficient or excess generation, the Contested Settlement approved by FERC fails to address the very issues that FERC found to be the primary problem with the existing market.

1. FERC acted arbitrarily and capriciously when it rejected, as irrelevant, evidence of differences in prices between Maine and the rest of New England.

In the June 16 Order, FERC rejected MPUC's argument that the Transition Payments had not been shown to be just and reasonable for Maine ratepayers, and appeared to hold that different Transition Payments for Maine are not appropriate because price projections under the administrative LICAP proposal did not show price separation. FERC concluded that based on this information, the presence of RMR contracts in constrained zones and the fact that the Transition Period was a "limited period of time," it was "reasonable not to include a locational feature in the transition mechanism."[127]

In the MPUC Settlement Comments and in the MPUC Rehearing Request,[128] MPUC provided extensive evidence of price separation in the energy markets. As explained in these documents, price separation in the energy market demonstrated that Maine is export constrained. As explained by Dr. Austin,

---

[127] June 16 Order at P105, R1129.

[128] Each of which were joined by the Maine Public Advocate, *see infra* notes 9, 13.

> If there is an export constraint in the energy market at a particular time and place, this tells us that additional capacity at that location will be unable to deliver additional energy, and therefore additional reliability, to one or more areas elsewhere in New England.[129]

MPUC further explained that the energy market data was "the only relevant evidence that does provide an indication of whether price separation would occur [between Maine and the rest of New England] in the capacity market."[130]

Specifically, Dr. Austin stated:

> The most recent available evidence here is for 2005 when Maine was export constrained for the vast majority of summer on peak hours. This suggests that additional capacity in Maine would have been unable to improve reliability in some or all of the rest of New England.[131]

MPUC also cited ISO-NE findings that Maine was export constrained. For example, the Regional System Plan for 2005 stated, "... the Maine-New Hampshire interface limits receipt of generation output from Maine, including transfers from New Brunswick into New England."[132] In a reliability report which ISO-NE released shortly after the end of the comment period, ISO-NE stated that there were Maine export constraints "about 10.5% of the real-time hours during 2005" and that "[t]hese binding constraints occurred during the on-peak periods

---

[129] Austin Supp. Affidavit at ¶ 6, R1094.

[130] MPUC Rehearing Request at 15, R1198.

[131] Austin Supp. Affidavit at ¶ 5, R1094.

[132] *Id.* at ¶ 10, quoting RSP-05, Executive Summary at p. ES-5, R1094.

about 6% of the time, while off-peak constraints occurred in about 4.5% of all hours.[133] In addition, MPUC also produced information about new generation being developed in Maine and the price of locational ICAP in the non-constrained areas of upstate New York.[134]

FERC never analyzed this data. Instead, abandoning its earlier rationale that price separation between Maine and the rest of New England in the capacity market was not justified by the record, FERC brushed aside all of the evidence that separate prices were warranted for Maine, finding that it is irrelevant whether Maine is export constrained, and therefore would experience lower capacity prices in an auction or market as it does in the energy market under LMP. FERC stated that:

> ...the issue of Maine being export-constrained is not the subject of this proceeding. The Commission's responsibility in approving the Settlement Agreement was not to determine whether or not Maine is export-constrained. Rather, the Commission's responsibility is to ensure that rates are just and reasonable.

Thus, FERC determined that it "will not initiate procedures to gather evidence and determine "appropriate capacity rates" for the interim period, for Maine or any other states affected by the Settlement Agreement."[135]

---

[133] ISO-NE 2005 Reliability Report at 21-22 (issued June 1, 2006), located at http://www.iso-ne.com/pubs/spcl_rpts/2005/index.html.

[134] *See* MPUC Rehearing Request at 13-16, R1132.

[135] Rehearing Order at PP 72-74, R1149 (internal citations omitted).

Additionally, FERC denied MPUC's Motion to Lodge the DOE Congestion Study. MPUC had asserted that the DOE Congestion Study (issued after the June 16 Order) provided additional evidence that Maine is export-constrained. However, despite the fact that no party had objected to the Motion to Lodge, and that FERC allowed ISO-NE and other parties to file answers to MPUC's request for rehearing even though such answers are not normally permitted,[136] FERC purported to be concerned that granting the motion "would effectively deny parties the opportunity to respond to the evidence;" however, FERC's primary rationale appears to be its conclusion that "the new evidence relates to whether Maine is export constrained, which is not the subject of this proceeding."[137] FERC's answer to MPUC that it considers export constraints "irrelevant," is arbitrary and capricious, because refusing to determine whether Maine is export constrained prevented FERC from being able to conclude that the Transition Payments are just and reasonable for Maine ratepayers.[138]

---

[136] *See* Rehearing Order at P 16, R1149 ("Rule 213(a)(2) of the Commission's Rules of Practice and Procedure [18 C.F.R. §385.213(a)(2)(2006)] prohibits and answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept the answers of ISO-NE, NEPOOL and CT DPUC because they have provided information that has assisted us in our decision-making process.").

[137] Rehearing Order at P 76, R1149.

[138] Unlike FERC, ISO-NE recognized that whether Maine was export constrained was critical to a determination of the price Maine ratepayers should pay for

FERC's refusal to analyze any of this evidence was arbitrary and capricious and amounted to an abdication of FERC's regulatory function. Instead of simply accepting the judgment of the Settling Parties, FERC was required to determine if the Transition Payments were just and reasonable for consumers, including non-settling parties such as MPUC.[139] Here, instead of considering the locational value of capacity, which it had earlier determined "was absolutely necessary," FERC dismissed as irrelevant evidence of locational differences between Maine and the rest of New England. In failing to engage the arguments squarely before it, FERC failed to engage in reasoned decision making.[140]

---

capacity; however, ISO-NE tried to demonstrate that Maine was not export constrained:

> Some have argued that ratepayers in import constrained zones should pay more for capacity than those in capacity surplus zones and that customers in export constrained zones should pay less than those in zones with (sic) surplus. *This is of course true* if the facts demonstrate that zones are actually constrained.

Explanatory Statement of the Settling Parties in Support of Settlement Agreement and Request for Expedited Consideration, March 6, 2006 at 39, R1071 (emphasis added).

[139] *See Laclede,* 997 F.2d 936 at 948 (In approving a settlement, FERC must support the decision with sufficient attention to the issues raised).

[140] *See NorAm Gas Transmission Co.*, 148 F.3d at 1162.

2. FERC acted arbitrarily and capriciously by approving a non-locational capacity structure which it had previously found to be unjust and unreasonable.

In approving the Contested Settlement, FERC abandoned the very core of the market reform it sought to implement in 2004—the development of a "mechanism that implements location or deliverability requirements in the ICAP or resource adequacy market"[141] to "appropriately value capacity resources according to their location."[142] In 2004, and again in 2005, FERC was unequivocal in its determination to move forward with a locational capacity mechanism, even going so far as to reject a request to delay the change to a locational capacity market, finding that getting such a proposal in place was "absolutely necessary."[143]

Here, FERC should have rejected a rate that allows non-locational capacity prices to continue for an extended period, where FERC had previously found that locational pricing was absolutely necessary without delay and where it subsequently found in another proceeding that locational pricing was required in order for capacity markets to be effective. In approving the Contested Settlement,

---

[141] *Devon Power, LLC*, 103 FERC ¶ 61,082 at P 37 (2003).

[142] *Devon Power, LLC,* 109 FERC ¶ 61,154 at P 32, R461.

[143] *Id. See also, PJM Interconnection,* 119 FERC ¶ 61,318 at P 76 (2007) ("Capacity market prices must be locational in order to be fully effective").

FERC departed from its policy directives and, as discussed below, impermissibly did so without a reasoned explanation.[144]

Instead of rejecting the Contested Settlement because a crucial element of it was flawed, FERC instead found that although it "may not consider the transition payments ideal as a single market design element,"[145] they were reasonable as a transitional element in the Contested Settlement. The *Devon* Orders excuse FERC's departure from locational capacity pricing by labeling the first three-to-four years of rates as merely a "bridge" to a locational mechanism.[146]

This explanation fails to give a reasoned basis for FERC's change in course, because FERC's approval of the Contested Settlement allows an even *longer* delay of locational pricing for capacity than the delay FERC previously rejected, citing, as its reason, that locational price signals were "absolutely necessary." Thus, the need for delay in locational pricing cannot form a reasoned basis for FERC's approval of the Contested Stipulation.

---

[144] *See Petal Gas Storage, LLC v. FERC,* Nos 04-1166, *et al., slip op.* at 3 (D.C. Cir. August 7, 2007) quoting *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003) (FERC's duty to engage in reasoned decision making requires the reviewing court to "reverse a decision which departs from established precedent without a reasoned explanation.").

[145] June 16 Order P 89, R1129.

[146] Rehearing Order P 47, R1149.

That leaves, as FERC's sole rationale, the suggestion that an unreasonable market design may become reasonable by virtue of the mitigating aspects of the rest of the settlement. The problem with this rationale, however, is that FERC has failed to support this conclusion with substantial evidence or explain how the other aspects of the Contested Settlement somehow transform a flawed mechanism into a just and reasonable rate. Nor has FERC has cited any specific need for delaying the locational component other than the fact that the majority of parties preferred non-locational pricing. While FERC posits that the Transition Payments "enable the New England Region to shift to the FCM," it never explains why non-locational, as opposed to locational, Transition Payments are necessary to enable the shift to the FCM.[147]

In sharp contrast to the dearth of evidence either supporting the delay in a locational capacity mechanism or showing how the other aspects of the Contested Settlement mitigate this market flaw, there was extensive evidence, discussed above, that Maine consumers will be paying rates that do not reflect the surplus of capacity in Maine and the limited ability of the transmission system to deliver the energy from that capacity to the areas with capacity shortages. The flawed transition mechanism alone, as well as evidence of the effect of the flaw upon

---

[147] *Cf.*, *Southwest Power Pool, Inc.* 116 FERC ¶ 61,289 at PP 41-44 (2006) (although not favoring bid caps, requiring them in the transitional start-up phase of a new imbalance market to mitigate possible unforeseen problems).

Maine ratepayers, should have resulted in the rejection of the Contested Settlement. At the very least, the matter should have been set for hearing to determine the proper level of Transition Payments for Maine ratepayers. Nothing in the FPA justifies the course chosen by FERC—maintaining a market flaw for an additional three-to-four years simply because it is part of a settlement agreement.

C. FERC's acceptance of a settlement which deprives non-settling parties of their rights under the FPA results in a settlement which is unjust, unreasonable and inconsistent with the public interest.

Section 4.C of the Contested Settlement states:

> From the Effective Date, absent the agreement of all settling Parties to the proposed change, the standard of review for: (i) challenges to the Capacity Clearing Prices derived through the FCA and prices resulting from reconfiguration auctions provided for in the Settlement Agreement and in the Market Rules addressing the terms of the Settlement Agreement that are approved or accepted by the FERC pursuant to section 3, and (ii) proposed changes to section 11, Part VIII below (Agreements Regarding Transition Period) and the Market Rules implementing that part, shall be the "public interest" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (the "*Mobile-Sierra*" doctrine), whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*. This Settlement Agreement does not impose the *Mobile-Sierra* standard on any provision of this Settlement Agreement or the Market Rules that address the terms of the Settlement Agreement except as expressly provided in this section 4.C.

The above-quoted provision of the Contested Settlement deprives Petitioners of their statutory rights. Therefore, FERC's decision to accept the Contested Settlement without modification to Section 4.C is arbitrary, capricious and contrary

to law. While under the *Mobile-Sierra* doctrine parties "may choose to voluntarily give up, by contract," their right to challenge contractual provisions under a "just and reasonable" standard,[148] FERC's approval of Section 4.C goes far beyond giving effect to the bargain made between contracting parties.

FERC's action is inconsistent with the purpose of the *Mobile-Sierra* doctrine, that "[t]he terms of the contract determine the parties' obligations . . . ."[149] As this Court has observed, "*Mobile-Sierra*'s recognized purpose" is "ensuring contract stability 'by subordinat[ing] the statutory filing mechanism to the broad and familiar dictates of contract law,'"[150] including the principle that a contract binds those who sign it and does not bind those who do not.[151]

Petitioners did not "choose to voluntarily give up" any of their rights, nor did they enter into any contract that should determine their obligations. Instead, others have entered into a Contested Settlement that purports to rob Petitioners of their rights under FPA Section 206.

---

[148] *Me. Public Utils. Comm'n*, 454 F.3d at 283.

[149] *Metro. Edison Co. v. FERC*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979); *see also Public Serv. v. Fed. Power Comm'n*, 543 F.2d 757, 796 (D.C. Cir. 1974) ("[T]he fundamental teaching of *Mobile* and *Sierra* is that the parties' agreement, and not the Commission's bent, sets the price . . . .").

[150] *Me. Public Utils. Comm'n*, 454 F.3d at 283 (quoting *Borough of Lansdale v. Fed. Power Comm'n*, 494 F.2d 1104, 1113 (D.C. Cir. 1974)).

[151] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

FERC defends its action by asserting that the impairment of Petitioners' statutory rights is for a time-certain, the Transition Period.[152] However, nothing in the FPA provides for the abrogation of a party's statutory rights if that abrogation is for a multi-year transition period. Further, under Section 4.C non-settling parties will not be able to challenge as unjust and reasonable FCM Capacity Clearing Prices extending well beyond 2010. Thus, even if there were a transition period exception in the FPA, and clearly there is not, Section 4.C extends beyond the transition period.

Finally, FERC "reassures" parties challenging its approval of Section 4.C that they are protected because FERC "retains significant authority to protect non-parties to the Settlement Agreement and the public."[153] However, FERC's "significant authority" to protect Petitioners' interests does not change the fact that the Contested Settlement deprives Petitioners of their rights to challenge market rules and rates under the statutory "just and reasonable" standard, as opposed to the more exacting "public interest" standard under *Mobile-Sierra*.[154]

---

[152] *See* Rehearing Order at P 89, R1149.

[153] *Id.* at P 94, R1149.

[154] *See Northeast Utilities Service Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) (Mobile-Sierra is "a more difficult standard . . . to meet than the statutory 'unjust and unreasonable' standard").

Further, FERC's approval of the Contested Settlement is inconsistent with its recent rulings in related cases. In *Bridgeport Energy, LLC*, FERC found that, "[b]ecause of the uniquely broad applicability of RMR agreements and market participants alike," FERC should not be bound by the higher public interest standard when reviewing RMR agreements.[155] Accordingly, FERC required that the agreement be changed to provide that FERC will be bound to the "just and reasonable" standard and not the "public interest" standard for changes to the RMR agreement.[156]

Here, the Transition Payments and the results of the FCM auction have an even broader effect than the RMR contract at issue in *Bridgeport.* The Contested Settlement involves capacity rates for all generation, not just one individual generator. Thus, FERC's rationale in *Bridgeport* should have led it to reject the Contested Settlement or require the removal of Section 4.C.

D. FERC is without jurisdiction to implement the FCM mechanism.

In its June 16 Order, FERC failed to identify any statutory authority to create a mechanism to force utilities in New England to purchase certain FERC-approved generation capacity. Moreover, FERC has no reasonable basis to infer that it has statutory authority to implement the FCM.

---

[155] 118 FERC ¶ 61,243 at P 41.

[156] *See id.*

1. The FPA precludes FERC from implementing the FCM mechanism to force states to acquire a specific level of capacity.

FERC has no authority under the FPA to design a mechanism that forces utilities within a state to acquire a specific level of capacity at a specific time and in a specific location. Congress unequivocally left this public policy determination to the states.[157]

The FCM is specifically designed to force the acquisition of a specific level of capacity to serve final electric demand within each state at a particular time and location and, therefore, implements a FERC-ordered resource adequacy determination. The FCM is driven by the administrative determination of the ICR, which becomes the artificial "demand" for the FCM auction, which, in turn, is the principle determinant of the capacity procured through the FCA. The suggestion that the FCM is not a mechanism to force states to acquire a specific level of capacity is belied by the June 16 Order, which provides that under the FCM "the amount of capacity procured will be the amount required to maintain the installed

---

[157] *See Pacific. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 211-12 (1983) ("States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking and the like."); *see also Miss. Indus. v. FERC*, 808 F.2d 1525, 1547 (D.C. Cir. 1987).

capacity requirement."[158] FERC's ruling also seeks to set the price consumers must pay for capacity.[159]

In addition, FERC has identified Connecticut as transmission-constrained, limiting its ability to import power from the other New England states. As a result, Connecticut may be designated a separate capacity zone, requiring it to satisfy a "local sourcing requirement[] (*i.e.*, the amount of capacity that must be obtained within each zone)."[160] Connecticut may therefore be required by FERC to obtain and pay for a specific amount of generating capacity that must be physically located within the state's borders within the time set by the FCA. Such a requirement constitutes a glaring violation the FPA.

FERC cites 16 U.S.C. § 824(b)(1) for the proposition that it has the authority to "establish a mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate commerce and to determine prices for those sales, bringing it squarely within the Commission's jurisdiction."[161] Section 824(b)(1), however, provides only that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and the

---

[158] June 16 Order at P 20, R1129.

[159] Explanatory Statement of the Settling Parties in Support of Settlement Agreement at 27, R1071.

[160] *Id.* at P 121, R1129.

[161] *Id.* at P 201, R1129.

sale of electric energy at wholesale in interstate commerce...." By its plain terms, this provision applies only to the "sale of electric energy" and not capacity.

Moreover, the FPA expressly provides that FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy...."[162] Congress made clear that while FERC has authority to order the interconnection of transmission facilities, FERC could do so provided, "[t]hat the Commission shall have *no authority to compel the enlargement of generating facilities* for such purposes."[163] Indeed, Congress even statutorily barred FERC from "compel[ing] the enlargement of generating facilities" for the purpose of providing "adequate service."[164] In short, "as dictated by the [FPA], . . . the Commission has no jurisdiction to regulate electric generation facilities."[165] Yet, this is plainly and precisely what the FCM and ICR are designed to do.

Similarly, while the reliability provisions in the Energy Policy Act of 2005 expand FERC's jurisdiction over transmission planning and reliability, they contain no provisions permitting FERC to usurp state authority over generation

---

[162] 16 U.S.C. § 824(b)(1).

[163] 16 U.S.C. § 824a(b)(emphasis added).

[164] 16 U.S.C. § 824*f*.

[165] *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 419 (1st Cir. 2001).

resource adequacy.[166] To the contrary, this statute's savings provisions continue to preclude FERC from preempting state authority over the adequacy of electric service within a state:

> This section does not authorize the . . . the Commission to order the construction of additional generation . . . or to set and enforce compliance with standards for adequacy or safety of electric facilities or services. Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within the State, as long as such action is not inconsistent with any reliability standard . . . .[167]

Indeed, if Congress had intended FERC to exercise jurisdiction over generation resource adequacy – thus upsetting decades of states' exclusive dominion – it would have expressly delegated this authority to FERC.[168] It did not, and FERC may not assert it in the guise of approving a FCM that obliges states to purchase a specific level of generation.

FERC's attempts to exert jurisdiction here contrast sharply with its exercise of expressly conferred statutory authority over interstate transmission, as the Supreme Court affirmed in *New York v. FERC*, 535 U.S. 1 (2002). The Court noted that FERC's jurisdiction beyond interstate transmission was circumscribed.

---

[166] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211, 119 Stat. 594, 941 (2005).

[167] *Id.* at 945.

[168] *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006).

The Court highlighted FERC's: (1) acknowledgement that "State regulation of most power production . . . is clearly distinguishable from this Commission's responsibility to ensure open and non-discriminatory interstate transmission service"[169]; and (2) affirmation that its transmission rule "will not affect or encroach upon state authority in such traditional areas as the authority over local service areas, including *reliability of local service; administration of integrated resource planning . . . [and] authority over utility generation and resource portfolios.*"[170] By adopting the FCM to impose resource adequacy requirements, however, FERC has directly usurped state authority for all of these determinations.

2. FERC has no reasonable basis to construe implicit authority to require states to purchase specific levels of generation.

Even if this Court could reasonably conclude that the FPA is "silent or ambiguous" about authority to require specific levels of generation to be obtained or installed within a state, FERC cannot sensibly construe the statute to give it such powers. In order to warrant deference to its rendition of delegated powers under the FPA, FERC must show that its interpretation is based on a permissible construction.[171] "[A]n agency's interpretation of a statute is not entitled to

---

[169] *Id.* at 12 n.9 (quoting Order 888 at 31,782)

[170] *Id.* at 24 (quoting Order 888 at 31,782 n.544) (emphasis added).

[171] *Chevron,* 467 U.S. at 842.

deference when it goes beyond the meaning that the statute can bear."[172] *Chevron* deference "is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying out the force of law . . . .'"[173] No reasonable interpretation of the FPA could give FERC such sweeping authority.

FERC cites 16 U.S.C. 824(b)(1) as its authority to establish the FCM. *See* June 16 Order at P 201, R1129. As noted above, Section 824(b)(1) applies only to the "sale of electric energy" and not capacity. FERC also cites *Municipalities of Groton v. FERC,* 587 F.2d 1296 (D.C. Cir. 1978) and *Miss. Industries v. FERC,* 808 F.2d 1525 (D.C. Cir. 1987) to support its claim of jurisdiction over charges for capacity in wholesale markets. These cases are distinguishable. Both cases involved challenges to FERC's jurisdiction over the allocation of *existing* rate schedules affecting wholesale electricity prices.

In *Municipalities of Groton*, the question was whether a deficiency charge imposed when a participant's system capability falls below its capability responsibility was a charge for power and services, and not the question of who has jurisdiction to set and enforce a level of capability requirements for New England. In *Mississippi Industries*, the court approved FERC's allocation of existing

---

[172] *MCI Telecomms. Corp. v. AT& T Co.*, 512 U.S. 218, 229 (1994) (citations ommitted).

[173] *Gonzales,* 126 S. Ct. at 915.

capacity costs among utilities in different states, but FERC made no attempt to establish the amount of capacity that any state or region would have to provide and made no attempt to create a mechanism to impose its installed capacity requirement on the several states. Neither of these cases supports FERC's jurisdictional claim over generation resource adequacy or the mechanism to enforce those requirements.

In fact, this Court has recently considered this question in a related case.[174] In that case, the petitioner also challenged FERC's statutory authority to establish generation resource adequacy levels for the New England states. FERC raised both *Municipalities of Groton* and *Mississippi Industries* to support the proposition that it had jurisdiction to regulate generation resource adequacy. This Court rejected FERC's arguments stating that "whatever the merits of counsel's position none of the cases it cites involve the same circumstances that are at issue here."[175]

Moreover, FERC has elsewhere acknowledged the limits of "its jurisdiction. . . over matters of resource adequacy and reliability."[176] In California, FERC acknowledged that:

---

[174] *Connecticut Department of Public Utility Control v. FERC*, 484 F.3d 558 (D.C. Cir. 2007).

[175] *Connecticut Department of Public Utility Control*, 484 F.3d at 561.

[176] *Devon Power LLC*, 110 FERC ¶ 61,313 at P 39 (2005); *Devon Power LLC,* 110 FERC ¶ 61,315 at P 29 (2005).

> [u]nder Section 215 of the FPA, the Commission has jurisdiction to approve and enforce Reliability Standards. The term Reliability Standards does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity. Under sections 202(b) and 207, the Commission has no authority to compel the enlargement of generating facilities . . .[177]

FERC further provided that it "will not interfere with the resource adequacy decisions of the CPUC or other [Local Regulatory Authorities]."[178]

Similarly, in *Midwest Indep. Transmission Sys. Operator, Inc.*,[179] the Midwest ISO filed a petition for declaratory order seeking approval of its market rules. FERC acknowledged, however, that its "express intent was not to usurp state authority" with respect to resource adequacy determinations,[180] and that "we did not intend . . . to imply that we expect the Midwest ISO to administer any particular Resource Adequacy requirement or even that we expect the Midwest ISO to develop any particular mechanism for ensuring resource adequacy."[181] Here, FERC has asserted its authority to make both determinations. FERC's

---

[177] *Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,172 at P 28 n.8 (2006).

[178] *Id.* at P 28.

[179] 102 FERC ¶ 61,196 ("*MISO*"), *Order on Rehearing*, 103 FERC ¶ 61,210 (2003) ("*MISO II*").

[180] *MISO II* at P 18.

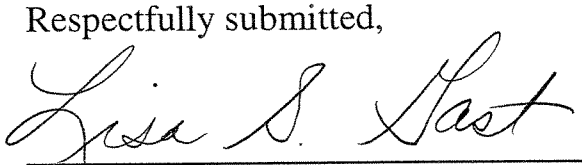
[181] *Id.* at P 19.

exercise of jurisdiction over resource adequacy in New England is therefore arbitrary and capricious and should be reversed.

X. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court remand the *Devon* and *ISO-NE* Orders back to FERC for further proceedings to adduce evidence on the costs and revenues of existing generation to determine whether the Transition Payments are just and reasonable compensation for existing generation. MPUC respectfully requests that, on remand, FERC be directed to consider evidence of Maine's export constraint and determine "appropriate capacity rates for Maine."[182] The Attorneys General respectfully request that this Court find that FERC has no jurisdiction over the subject-matter of the Contested Settlement at issue here.

Respectfully submitted,



LISA S. GAST
L. ELISE DIETERICH
DUNCAN, WEINBERG, GENZER
& PEMBROKE, PC
1615 M St. NW – Suite 800
Washington, DC 20036-3203
(202) 467-6370

[182] Rehearing Order at 74, R1149.

KURT ADAMS
LISA FINK
STATE OF MAINE
PUBLIC UTILITIES COMMISSION
242 State Street
18 State House Station
Augusta, ME 04333-0018
(207) 287-1389

Attorneys for Petitioner Maine Public Utilities Commission

RICHARD BLUMENTHAL
ATTORNEY GENERAL FOR
THE STATE OF CONNECTICUT

MICHAEL C. WERTHEIMER
JOHN S. WRIGHT
ASSISTANT ATTORNEYS GENERAL
CONNECTICUT OFFICE OF THE
ATTORNEY GENERAL
10 Franklin Square
New Britain, CT 06051
(860) 827-2620

Attorneys for Petitioner Richard Blumenthal, Attorney General for the State of Connecticut

MARTHA COAKLEY
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF
MASSACHUSETTS

JESSE S. REYES
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE MASSACHUSETTS
ATTORNEY GENERAL
ENERGY & TELECOM DIVISION
One Ashburton Place, 18th Fl.
Boston, MA 02108-1598
(617) 727-2200 (Ext. 2432)

Attorney for Petitioner Martha Coakley,
Attorney General for the
Commonwealth of Massachusetts

Dated: August 20, 2007

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

_X_ this brief contains 13,840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

_X_ this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 pt Times New Roman font.

(s) Lisa S Gast

Lisa S. Gast

Attorney for Petitioner Maine Public Utilities Commission

Dated: August 20, 2007

APPENDIX

STATEMENT RE: DEFERRED APPENDIX

As noted in MPUC's Statement Regarding Deferred Appendix filed with the Court on January 12, 2007, the parties intend to utilize the Deferred Appendix option as contemplated in Federal Rules of Appellate Procedure Rule 30(c) and Circuit Rule 30(c).

STATUTORY AND REGULATORY ADDENDUM

comply with safety regulations governing such plants unless sanction is either unwarranted in law or without justification in fact. Bluestone Energy Design, Inc. v. F.E.R.C., C.A.D.C.1996, 74 F.3d 1288, 316 U.S.App.D.C. 27.

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

STATUTORY ADDENDUM

TABLE OF CONTENTS

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [15 U.S.C.A. § 79 et seq.].

(June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847, and amended Nov. 9, 1978, Pub.L. 95–617, Title II, § 204(b), 92 Stat. 3140; Oct. 24, 1992, Pub.L. 102–486, Title VII, § 714, 106 Stat. 2911.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1978 Acts. Senate Report No. 95–141 and House Report No. 95–543, see 1978 U.S. Code Cong. and Adm. News, p. 7660.

1992 Acts. House Report No. 102–474(Parts I–IX), House Conference Report No. 102–1018, and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 1953.

References in Text

The Public Utility Holding Company Act of 1935, referred to in subsec. (g)(5), is Act Aug. 26, 1935, c. 687, Title I, 49 Stat. 838, as amended, which is classified generally to chapter 2C (section 79 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 79 of Title 15 and Tables.

Amendments

1992 Amendments. Subsec. (g). Pub.L. 102–486, § 714. added subsec. (g).

1978 Amendments. Subsec. (b). Pub.L. 95–617, § 204(b)(1), designated existing provisions as par. (1) and, in par. (1) as so designated, inserted "except as provided in paragraph (2)" following "in interstate commerce, but" and added par. (2).

Subsec. (e). Pub.L. 95–617, § 204(b)(2), inserted "(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)" following "under this subchapter".

Transfer of Functions

The Federal Power Commission was terminated and its functions with regard to the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress under this subchapter were transferred to the Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R.

had directors and officers interlocking with the buyer and owned a sizable block of the buyer's stock, the facts were sufficient to show "knowledge" of fact that sales by corporation to the buyer were indispensable to the exchange arrangement which culminated in transmission to Massachusetts, and sale therein of considerable quantities of electric energy, for purpose of determining whether the corporation was a public utility subject to the jurisdiction of the Commission. Hartford Electric Light Co. v. Federal Power Commission, C.C.A. 2 1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698.

31. Questions for Commission

Whether facilities are used in local distribution of electric energy—although a limitation on Commission jurisdiction over wholesale electric rates and a legal standard that must be given effect in addition to technological transmission test—involves a question of fact to be decided by the Commission as an original matter. Federal Power Commission v. Southern Cal. Edison Co., U.S.Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Subsec. (b) of this section, providing that the Commission shall not have jurisdiction except as specifically provided over facilities used in local distribution is a limitation on jurisdiction of Commission and a legal standard that must be given effect in addition to technological transmission test in determining whether Commission has jurisdiction to regulate accounting practices of electric companies. Connecticut Light & Power Co. v. Federal Power Commission, U.S.Dist.Col. 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

32. Certiorari to Supreme Court

Certiorari was granted in case presenting question of jurisdiction of Commission over wholesale sale of electricity because of importance of question in administration of this subchapter. Federal Power Commission v. Southern Cal. Edison Co., U.S.Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Where question whether sales of electricity in interstate commerce for consumption by buyers and sales for resale were separate transactions was not presented to State Power Commission such question would not be determined by United States Supreme Court on writ of certiorari to state Supreme Court affirming, in effect, the Commission's determination that all sales were subject to such Commission's regulation. U. S. v. Public Utilities Commission of Cal., U.S.Cal. 1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, 345 U.S. 961, 97 L.Ed. 1380.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each

such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and

reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided,* That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further,* That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as

such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) **Continuance of service**

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

(June 10, 1920, c. 285, § 202, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 848, and amended Aug. 7, 1953, c. 343, 67 Stat. 461; Nov. 9, 1978, Pub.L. 95–617, Title II, § 206(a), 92 Stat. 3141.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1953 Acts. House Report No. 978, see 1953 U.S. Code Cong. and Adm. News, p. 2164.

1978 Acts. Senate Report No. 95–141 and House Report No. 95–543, see 1978 U.S. Code Cong. and Adm. News, p. 7660.

Amendments

1978 Amendments. Subsec. (g). Pub.L. 95–617 added subsec. (g).

1953 Amendments. Subsec. (f). Act Aug. 7, 1953 added subsec. (f).

Effective and Applicability Provisions

1978 Acts. Pub.L. 95–617, Title II, § 206(b), Nov. 9, 1978, 92 Stat. 3142, provided that: "The amendment made by subsection (a) [adding subsec. (g) of this section] shall not affect any proceeding of the Commission pending on the date of the enactment of this Act [Nov. 9, 1978] or any case pending on such date respecting a proceeding of the Commission."

Transfer of Functions

The Federal Power Commission was terminated and its functions with regard to the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress under this subchapter and interconnection, under this section, of facilities for the generation, transmission, and sale of electric energy, other than emergency interconnection, were trans-

Provision of agreement executed by gas company and confirmed by Commission in settlement of a rate proceeding that if gas company received refunds from its gas suppliers applicable to a stated period the appropriately allocable share of such refunds shall be passed on to its wholesale customers did not entitle gas company to recoup difference between actual average gas purchase cost and predetermined cost used in settlement agreement from refunds received from suppliers before allocating and distributing remainder of funds among its customers. Manufacturers Light & Heat Co. v. Federal Power Commission, C.A.3 1967, 374 F.2d 88.

Finding of Commission that power company was engaged in sale of electric energy at wholesale in interstate commerce, and action of Commission in directing establishment of a contingent reserve to cover liability to make refunds for excesses were justified by the evidence. Wisconsin-Michigan Power Co. v. Federal Power Commission, C.A.7 1952, 197 F.2d 472, certiorari denied 73 S.Ct. 794, 345 U.S. 934, 97 L.Ed. 1362.

Where Commission for benefit of consumers reduced rates of natural gas company and ordered refund of excess collected pending review of order, refund belonged to consumers, and utilities served by natural gas company, which were mere conduits by which gas supplied by natural gas company was delivered to consumers, acquired no right thereto. Natural Gas Pipeline Co. of America v. Federal Power Commission, C.C.A. 7 1942, 134 F.2d 263.

111. Surcharge, rate determinations

Pursuant to power delivery ("wheeling") agreement between investor-owned public utility and nonprofit electric generation and transmission cooperative, public utility was not entitled to surcharges at tariff rate for past transmission of power generated by nonprofit electric cooperative and channeled through member cooperative, regardless of whether member cooperative used as conduit for service was listed as member cooperative in agreement; pursuant to agreement, listed members could have performed service that such member cooperative performed, and thus, public utility was not injured as result of use of member cooperative. Dayton Power and Light Co. v. F.E.R.C., C.A.6 1988, 843 F.2d 947.

On remand, Commissioner was not limited to approving or disapproving electric utility's surcharge, which sought to recover fuel costs not collectible under current fuel adjustment clause, on basis of factors relating uniquely to utility and its own customers but could properly take into account whether surcharge complied with Commission's view of sound rate-making policy. Maine Public Service Co. v. Federal Power Commission, C.A.1 1978, 579 F.2d 659.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule,

regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with

interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub.L. 100–473, § 2, 102 Stat. 2299.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. Senate Report No. 100–491, see 1988 U.S. Code Cong. and Adm. News, p. 2684.

References in Text

The Public Utility Holding Company Act of 1935, as amended, referred to in subsec. (c), is Act Aug. 26, 1935, c. 687, Title I, 49 Stat. 838, as amended, which is classified generally to chapter 2C (section 79 et seq.) of Title 15, Commerce and Trade. The terms "electric utility companies" and "registered holding company" are defined in section 79b(a)(3) and (12)

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, c. 285, § 207, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 853.)

HISTORICAL AND STATUTORY NOTES

Transfer of Functions

The Federal Power Commission was terminated and its functions with regard to the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress under this subchapter were transferred to the Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

LIBRARY REFERENCES

American Digest System

Electricity ⇐11(1).
Key Number System Topic No. 145.

Encyclopedias

Electricity, see C.J.S. §§ 24, 28.

Texts and Treatises

Natural and Marine Resources 24 Fed Proc L Ed § 56:341.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

with the provisions of sections 1535 and 1536 of Title 31, providing for interdepartmental work.

(June 10, 1920, c. 285, § 312, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 859, and amended Sept. 13, 1982, Pub.L. 97–258, § 4(b), 96 Stat. 1067.)

HISTORICAL AND STATUTORY NOTES

Codifications

"Sections 1535 and 1536 of Title 31" was substituted in text for "sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])" on authority of Pub.L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

Transfer of Functions

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

CROSS REFERENCES

Information on matters subject to investigation by Commission concerning regulatory provisions of natural gas companies published in manner authorized under this section, see 15 USCA § 717m.

Penalty mail, use to announce publication of maps, atlases, statistical and other reports, see 39 USCA § 3204.

LIBRARY REFERENCES

Administrative Law

Issuance of securities, see 18 CFR § 20.1 et seq.

American Digest System

Electricity ⇐1.
Key Number System Topic No. 145.
United States ⇐40.
Key Number System Topic No. 393.

Encyclopedias

Electricity, see C.J.S. § 1.
United States, see C.J.S. §§ 38 to 40.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commis-

sion is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) **Stay of Commission's order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85–791, § 16, 72 Stat. 947.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1958 Acts. Senate Report No. 2129, see 1958 U.S. Code Cong. and Adm. News, p. 3996.

Codifications

In subsec. (b), "section 1254 of Title 28" was substituted for "sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, secs. 346 and 347)" on authority of Act June 25, 1948, c. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

Amendments

1958 Amendments. Subsec. (a). Pub.L. 85–791, § 16(a), added sentence providing that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub.L. 85–791, § 16(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon" and "file with the court" for "certify and file with the court a transcript of", and inserted "as provided in section 2112 of Title 28", and in third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

Change of Name

Act June 25, 1948, eff. Sept. 1, 1948, as amended by Act May 24, 1949, substituted "Court of Appeals" for "Circuit Court of Appeals".

Transfer of Functions

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

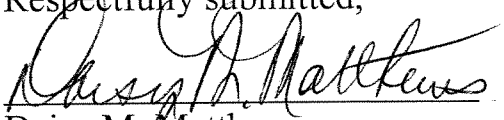
All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing document upon each of the persons on the attached list of parties to this case by depositing a copy to each of them in the United States mail, first class, postage prepaid.

Dated at Washington DC this 20th day of August 2007.

Respectfully submitted,



Daisy M. Matthews

Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M Street, NW
Suite 800
Washington, DC 20036
(202) 467-6370
(202) 467-6379 (Fax)

Case No. 06-1403
Consolidated Case Nos. 06-1427 & 07-1193

Randall L. Speck
Kaye Scholer, LLP
901 15th Street, NW
The McPherson Building
Suite 1100
Washington, DC 20005
(202) 682-3510
(202) 414-0320 (Fax)

Mark F. Sundback
Kenneth L Wiseman
Andrews Kurth, LLP
1350 I Street, NW
Suite 1100
Washington, DC 20005
(202) 662-2700
(202) 662-2739 (Fax)

David T. Musselman, General Counsel
Aaron J. Bullwinkel, Senior Counsel
International Power America, Inc.
62 Forest Street
Suite 102
Marlborough, MA 01752
(508) 382-9300
(508) 382-9400 (Fax)

Larry F. Eisenstat
George Edward Johnson
Dickstein Shapiro, LLP
1825 Eye Street, NW
Washington, DC 20006-5403
(202) 420-2224
(202) 420-2201 (Fax)

Scott Phillip Myers
Day Pitney, LLP
City Place I
Hartford, CT 06103-3499
(860) 275-0361
(860) 275-0343 (Fax)

Michael C. Wertheimer
John Story Wright
Attorney General's Office of
State of Connecticut
10 Franklin Square
Department of Public Utility Control
New Britain, CT 06051
(860) 827-2684
(860) 827-2893 (Fax)

Joseph W. Rogers
Attorney General's Office of
State of Massachusetts
1 Ashburton Place
Boston, MA 02108
(617) 727-2200
(617) 727-1047 (Fax)

Angela Avery
Associated General Counsel
TransCanada Power Marketing, Ltd.
450 1st Street, SW
Calgary, Alberta T2P 5H1
Canada
(403) 920 2171
(403) 920-2354 (Fax)

Lisa Fink
Maine Public Utilities Commission
242 State Street
18 State House Station
Augusta, ME 04333
(207) 287-1389
(202) 287-1039 (Fax)

Robert H. Solomon, Deputy Solicitor
Federal Energy Regulatory Commission
888 First Street, NE
Room 91-01
Washington, DC 20426-0001
(202) 502-6027
(202) 273-0901 (Fax)

Case No. 06-1403
Consolidated Case Nos. 06-1427 & 07-1193

John N. Estes, III
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, NW
Washington, DC 20005-2111
(202) 371-7000
(202) 393-5670 (Fax)

Scott G. Silverstein
Sithe Energies, Inc.
245 Park Avenue
38th Floor
New York, NY 10167-0002
(212) 351-0222
(212) 351-0005 (Fax)

Linda S. Lockhart
Donald J. Sipe
Preti, Flaherty, Beliveau, Pachios & Haley
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058
(207) 623-5300
(207) 623-2914 (Fax)

James F. Bowe, Jr.
Hugh E. Hilliard
Dewey Ballantine, LLP
975 F Street, NW
Washington, DC 20004
(202) 862-1000
(202) 862-1093 (Fax)

Mary E. Grover
Assistant General Counsel
NSTAR Electric & Gas Coporation
800 Boylston Street
17th Floor
Boston, MA 02199-8003
(617) 424-2105
(617) 424-2733 (Fax)

Stephen L. Teichler
Stephanie Conaghan
Duane Morris LLP
1667 K Street, NW
Suite 700
Washington, DC 20006
(202) 776-7830
(202) 776-7801 (Fax)

Robert A. Weishaar, Jr.
McNees Wallace & Nurick, LLC
777 North Capitol Street, NE
Suite 401
Washington, DC 20002
(202) 898-5700
(202) 898-0688 (Fax)

Scott H. Strauss
Spiegel & McDiarmid
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000
(202) 393-2866 (Fax)

Philip Sussler
Connecticut Municipal Electric
Energy Cooperative
30 Stott Avenue
Norwich, CT 06360-1526
(860) 889-4088
(860) 889-8158 (Fax)

Nicholas J. Scobbo, Jr.
Ferriter, Scobbo, Caruso & Rodophele
125 High Street
26th Floor
Boston, MA 02110-2704
(617) 737-1800
(617) 737-1803 (Fax)

Case No. 06-1403
Consolidated Case Nos. 06-1427 & 07-1193

Raymond W. Hepper
Kerim P. May
James H. Douglass
ISO New England, Inc.
One Sullivan Road
Holyoke, MA 01040-2841
(413) 540-4559
(413) 535-4379 (Fax)

Clinton A. Vince
Sherry A. Quirk
J. Cathy Fogel
Sandra Barbulescu
Sullivan & Worcester, LLP
1666 K Street, NW, Suite 700
Washington, DC 20006
(202) 775-6810
(202) 293-2275 (Fax)

Christopher C. O'Hara
NRG Energy, Inc.
211 Carnegie Center Drive
Princeton, NJ 08540
(609) 542-4601
(609) 524-4589 (Fax)

James K. Mitchell
Thelen Reid Brown Raysman & Steiner
701 8th Street, NW
Washington, DC 20001-3721
(202) 508-4000

Vasiliki Karandrikas
McNees, Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 237-5300 (Fax)

James C. Beh
Troutman Sanders
401 9th Street, NW
Suite 1000
Washington, DC 20004-2134
(202) 274-2950
(202) 274-2939 (Fax)

James H. McGrew
Bruder, Gentile & Marcoux
1701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20006-5805
(202) 296-1500
(202) 296-0627 (Fax)

Kenneth R. Carretta
PSEG Services Corp.
80 Park Plaza - T5G
Newark, NJ 07102-0570
(973) 430-6409
(201) 430-6462 (Fax)

Barry S. Spector
Paul M. Flynn
Wright & Talisman
1200 G Street, NW
Suite 600
Washington, DC 20005-3802
(202) 393-1200

Jeffery S. Dennis
Federal Energy Regulatory Commission
888 First Street, NE
Room 106-05
Washington, DC 20426
(202) 502-6600
(202) 273-0901 (Fax)